Supreme Court, U.S.
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No. 95-1809

In the Supreme Court of the United States

OCTOBER TERM, 1995

ROBERT E. HILL, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in a suit under the Federal Tort Claims Act, the court of appeals erred in directing the district court to grant the United States a reversionary interest in a trust established to fund the injured party's future care, so as to treat the United States in a manner similar to the treatment accorded private defendants under applicable state law.

2. Whether the court of appeals erred in concluding that the United States did not waive the reversionary trust issue before the district court.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1pa-10pa) is reported at 81 F.3d 118. The opinions of the district court (Pet. App. 16pa-26pa and 27pa-48pa) are reported at 854 F. Supp. 727 and 864 F. Supp. 1030.

JURISDICTION

The judgment of the court of appeals was entered on February 5, 1996. The petition for a writ of certiorari was filed on May 6, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Colorado Health Care Availability Act, Colo. Rev. Stat. Ann. § 13-64-201 *et seq.* (West 1989) (HCAA) (Pet. App. 68pa-80pa), when medical care institutions and professionals are found liable in Colorado state courts for medical torts, future damages are compensated through periodic payments. Colo. Rev. Stat. Ann. § 13-64-203(1) (West 1989). The periodic payments must be funded in full within 60 days after entry of the judgment. Colo. Rev. Stat. Ann. § 13-64-208(1) (West 1989). They may be funded, *inter alia*, by the defendant's purchase of an annuity contract or United States, Colorado, or other qualified public obligations. Colo. Rev. Stat. Ann. § 13-64-207(1) (West 1989). Upon the death of the tort victim, the periodic payments cease. Colo. Rev. Stat. Ann. § 13-64-206(3) (West 1989).[1] Otherwise, "were the tort victim to die prematurely, the unspent medical and related damages would accrue to the estate of the victim and thus represent a windfall to the victim's heirs." Pet. App. 6pa.

2. Tasha Hill, a minor, was seriously injured as a result of the government's negligence at Army medical facilities in Colorado. Pet. App. 4pa. In a suit brought under the Federal Tort Claims Act (FTCA), the government conceded liability, and the district

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[1] Payments awarded to compensate for lost future earnings are not terminated upon the death of the tort victim, but are instead made to his or her heirs and devisees. Colo. Rev. Stat. Ann. § 13-64-206(3) (West 1989). The trial court, moreover, may "for good cause shown" specify in the judgment that all periodic payments are to continue for a certain term of years notwithstanding the death of the tort victim during such term. Colo. Rev. Stat. Ann. § 13-64-206(2) (West 1989).

court awarded damages of $13,528,400 to Tasha and $1,017,500 to her parents. *Id.* at 46pa-47pa. Of the damages awarded to Tasha, $10,019,800 were to compensate her for future life care costs such as living expenses, medical care, and rehabilitation services. *Id.* at 34pa-41pa, 46pa.

The parties stipulated that the Colorado HCAA, with its periodic payment requirement, did not apply to the United States. Pet. 8-10. The parties agreed that it would be appropriate to place the future life care portion of Tasha's award in a trust for her benefit. Pet. App. 19pa. The government requested, however, that the trust instrument contain a reversionary clause in its favor, to put it on the same footing as similarly situated private defendants under the HCAA. *Id.* at 22pa. The district court denied that request. *Id.* at 19pa-23pa.

2. The court of appeals reversed in part and remanded.[2] It acknowledged that the United States may not be ordered to make periodic payments under the FTCA, Pet. App. 6pa (citing *Hull* v. *United States*, 971 F.2d 1499, 1505 (10th Cir. 1992), cert. denied, 507 U.S. 1030 (1993)), and that the HCAA accordingly "does not itself apply to the government," *ibid.* The court recognized, however, that, "under the FTCA, the government is to be treated 'in the same manner and to the same extent as a private individual under like circumstances' depending on the law of the state where the tort occurred." *Id.* at 6pa (quoting 28 U.S.C. 2674). It concluded (Pet. App. 8pa) on that ground that the district court should have created a

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[2] The court rejected the government's challenge to the amount awarded Tasha's parents for her past care. Pet. App. 4pa-5pa.

trust with a reversionary interest in the government, in order to "approximate the result contemplated by the HCAA." As under the HCAA, no part of the award for medical damages intended for the victim of malpractice would accrue to the victim's heirs upon her death. It remanded the case "in order for the district court to create such a trust." *Id.* at 9pa.

ARGUMENT

Petitioners dispute (Pet. 12-22) the court of appeals' holding that the HCAA cannot lawfully be applied to the federal government and its conclusion that the use of a reversionary trust in this case will approximate the treatment of private defendants under the HCAA. They contend (Pet. 22-27), moreover, that the United States waived its right in this case to rely in any way on the HCAA.

1. Petitioners argue (Pet. 18) that, notwithstanding the absence of judicial authority to order the federal government to make periodic payments, the HCAA may lawfully be applied to the government. They assert (Pet. 18 n.4) that "the government could simply refuse to fund the periodic payments and thus be ordered to pay the present value of the future damages pursuant to Section [208(2)] of the HCAA." That is incorrect. Under the HCAA, a court may order a defendant to make a lump sum payment only upon the defendant's failure to comply with an earlier order directing the defendant to provide funding for periodic payments. Colo. Rev. Stat. Ann. § 13-64-208(2) (West 1989). Since the courts have no authority to issue judgments requiring the federal government to fund periodic payments in the first place, see, *e.g.*, *Hull*, 971 F.2d at 1505; *Frankel* v. *Heym*, 466 F.2d 1226, 1228-1229 (3d Cir. 1972), the

courts' authority to order a lump sum payment under the HCAA cannot be triggered in suits against the government.

2. Petitioners argue (Pet. 14-18, 20-21) that the use of a reversionary trust violates the FTCA's requirement that the federal government should be liable "in the same manner and to the same extent as a private individual under the same circumstances." See 28 U.S.C. 2674. First, petitioners observe that the court of appeals "ma[de] no reference" to Section 206(2) of the HCAA, which permits a court "for good cause shown" to specify in the judgment that a fixed number of periodic payments will be made irrespective of whether the injured party dies before the last of such payments. Pet. 14 (quoting Colo. Rev. Stat. Ann. § 13-64-206(2) (West 1989)). The court of appeals, however, merely directed the district court to "create a reversionary trust that would approximate the result contemplated by the HCAA." Pet. App. 8pa. The terms of remand do not prevent the district court from entertaining a motion to require the government to make a fixed number of payments, as under Colo. Rev. Stat. Ann. § 13-64-206(2) (West 1989), "for good cause shown."

Second, petitioners argue (Pet. 15-18) that permitting the federal government to retain a reversionary interest in the trust treats the government more leniently than a private defendant. A private defendant, however, is permitted to satisfy a tort judgment through the purchase of an annuity from a licensed insurance company. See Colo. Rev. Stat. Ann. § 13-64-207(1)(a) (West 1989). As petitioners acknowledge (Pet. 16-17), the price of such an annuity takes into account the actuarial probability of the tort victim's premature death. The defendant's monetary

obligation is thus determined by the expected present value of the periodic payment obligation. Although the United States is not (and, indeed, could not be) forced by the court of appeals' ruling to purchase an annuity to fund periodic payments, the use of a reversionary trust will cause the government's obligation to approximate the cost of a periodic payment obligation. We acknowledge that that result will not put the government in precisely the same position as a private defendant under the HCAA. The expected present value of a periodic payment obligation will only by fortuity equal the actual cost of such obligation, and (unlike a private defendant) the government is not forced to pay a premium to a third party annuity provider. But use of a reversionary trust does *approximate* the treatment of a private defendant. Moreover, it does so far more closely than would a trust lacking a reversionary feature, which would put the government in a considerably worse position than that of a private defendant under the HCAA.[3]

3. Petitioners argue (Pet. 21 n.5) that they were prejudiced because their trial evidence as to future

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[3] It should be noted, moreover, that Tasha is more favorably treated under the court of appeals' ruling than she would have been under the HCAA's periodic payment scheme. Damages will be paid by the United States to the trust in a lump sum and, under the terms of the trust instrument (as drafted by petitioners and approved by the district court), payments may be made from the trust as needed for Tasha's care "so as to maximize her enjoyment of life and to extend her life." Pet. App. 24pa (quoting trust instrument). The court's ruling thus offers both the benefit of accrual of investment income that is ordinarily associated with lump sum damages and significant flexibility respecting the timing and amount of payments from the trust for Tasha's care.

inflation rates assumed payment of a lump sum judgment, not periodic payments as under the HCAA. They observe (*ibid.*) that periodic payment arrangements entail additional inflation risk. To the extent that inflation rates turn out to be higher than expected, periodic payments will not buy as much future care as expected. When damages are paid in a lump sum, on the other hand, higher inflation rates may be offset by higher rates of interest earned on the principal. Petitioners claim that, if they had known that the court would grant the government a reversionary interest in the trust, they would have presented evidence of higher expected inflation rates. *Ibid.*

Petitioners' argument is without merit. To begin with, there is no reason that petitioners' experts' views regarding expected future inflation rates should depend on the form of the judgment in this case. Estimates of future inflation rates have nothing to do with the method of payment adopted in a particular case. See generally *Jones & Laughlin Steel Corp.* v. *Pfeifer*, 462 U.S. 523, 547-551 (1983) (explaining the use of inflation testimony in computing awards of future damages).

Moreover, even if petitioners' inflation rate testimony would have differed had this case been subject to the HCAA's periodic payment requirement, that would not support petitioners' argument. Although the court of appeals ordered the district court to employ a reversionary feature in order to treat the government in a manner comparable to private parties under the HCAA, the damages in this case will not be paid by the government periodically. Rather, the damages in this case will be deposited in a lump sum in a trust, from which amounts may be withdrawn by

the trustee—one of petitioners' counsel—as needed for Tasha's care. Pet. App. 24pa. Since the trust will accrue interest, Tasha will be exposed to no greater inflation risk than if she had received the lump sum free of the trust.

4. Finally, petitioners argue (Pet. 22-27) that the court of appeals erred in ruling (Pet. App. 9pa n.1) that the government did not waive the reversionary trust issue before the trial court. Contrary to petitioners' assertion, the government never waived its right to argue that the award in this case should be in the form of a reversionary trust. The government stipulated only that it would not, indeed could not, ask the district court to require the government to make periodic payments in accordance with the HCAA. The court of appeals correctly recognized that distinction. In all events, the court's understanding of the record in this case is not a matter that warrants this Court's review. See, *e.g.*, *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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